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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1634

CHARLES ZEMLIAK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

Petitioner seeks a writ of certiorari from this Court to the California Supreme Court to review its decision denying a hearing to petitioner and in effect validating the affirmance of petitioner's conviction for grand theft by the California Court of Appeal. The order of the California Supreme Court denying a hearing was filed on January 19, 1972, and a copy thereof is attached to the Petition as Appendix B. The opinion of the California Court of Appeal was filed on November 24, 1971 (*People v. Zemliak*, 2d Crim. No. 17226), and a copy of the opinion is attached to the Petition as Appendix A. It also appears that petitioner is additionally seeking a writ of certiorari from this

Court to review the denial of his petition for habeas corpus by the Superior Court of the State of California for the County of Los Angeles on April 27, 1972. (Pet. p. 7.)

Jurisdiction

Jurisdiction in the Petition is invoked pursuant to Title 28, United States Code, section 1257.

Questions Presented

The Petition, while not using an interrogatory form, contains affirmative arguments which, it is hoped, may fairly be summarized as raising the following questions:

1. Was petitioner entitled to be released from his plea bargain because the prosecution breached promises relied on by petitioner in entering his guilty plea?

2. Was petitioner entitled to release from the plea bargain on the basis of mistake, in that petitioner's counsel had led him to believe that certain promises as to probation had been made by the District Attorney's office?

3. Was petitioner entitled to be released from his plea bargain due to ineffective assistance of counsel, consisting of counsel's failure to adequately investigate the underlying facts of the offense and failure to sufficiently confer with petitioner?

4. Should the principles enunciated in *Boykin v. Alabama*, 395 U.S. 238 (1969), be retroactively applied?

Statement of the Case

By a complaint filed in the California Municipal Court for the County of Los Angeles, petitioner was charged with grand theft in violation of section 487, subdivision 1, of the California Penal Code. Petitioner pleaded guilty to this charge and all other counts charged in the complaint were dismissed on motion of the People of the State of California. [Cl. Tr. p. 1.][1]

Petitioner filed a written motion to withdraw his plea of guilty, supported by declarations by himself and defense counsel and supported by additional affidavits and written points and authorities. [Cl. Tr. pp. 6-30.] The prosecution filed a declaration and affidavit in opposition to appellant's motion to withdraw his guilty plea and supported this by written points and authorities. [Cl. Tr. pp. 32-43.] Petitioner's motion to withdraw his plea of guilty was argued and denied. [Cl. Tr. p. 45.]

An extensive hearing was held at the time set for the determination of the issue of probation and sentence, and petitioner's renewed motion to withdraw his guilty plea and his motion to have the matter transferred back to the Municipal Court was denied. Probation was denied, and petitioner was sentenced to the California State Prison for the term prescribed by law. [Cl. Tr. pp. 46, 55.]

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[1]The clerk's transcript, as well as the reporter's transcript of this proceeding will be submitted by respondent upon request of the Court.

Petitioner appealed to the California Court of Appeal, which on November 24, 1971, after considering substantially the same contentions as petitioner now raises, affirmed the conviction. (Pet., App. A.) Petitioner then filed a petition for hearing in the California Supreme Court, which was denied on January 19, 1972. (Pet., App. B.)

Thereafter petitioner filed with this Court an Application for Bail and Stay Pending Filing of Petition for Certiorari (Case No. A-833), which was informally denied. Petitioner, though telegrams, submitted additional material to this Court, and Mr. Justice Douglas issued an order (Case No. A-833) on March 3, 1972, stating that subsequent to this Court's denial of petitioner's application for bail new facts had come to light suggesting a substantial claim under the recent decision in *Santobello v. New York*, 404 U.S. 257 (1971). The order denied petitioner's reapplication for bail, but suggested an evidentiary inquiry before another tribunal. (Pet. pp. 5-6.)

Petitioner, on or about March 13, 1972, then filed an application for habeas corpus in the California Court of Appeal, Second Appellate District, Division Five, asking for various relief, including an evidentiary hearing as suggested by Mr. Justice Douglas. On March 15, 1972, the California Court of Appeal issued an Order to Show Cause returnable in the Superior Court of the State of California for the County of Los Angeles, in effect ordering the prosecution to show cause

why the relief prayed for in the habeas corpus petition should not be granted. (Pet., App. C.)

After holding an extensive evidentiary hearing, the Superior Court discharged the order to show cause and denied the petition for habeas corpus on April 27, 1972. [C.T.H.S. p. 43; R.T.H.C. pp. 291-307.[2]]

Petitioner contends, and respondent agrees, that he thereafter filed a notice of appeal from the April 27, 1972, Superior Court ruling and that such an "appeal" is now pending before the California Court of Appeal.[3] [C.T.H.C. p. 44; Pet. p. 7.]

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[2]The designation "C.T.H.C." refers to the clerk's transcript of the habeas corpus evidentiary hearing held by the Superior Court pursuant to the Order to Show Cause of the California Court of Appeal. "R.T.H.C." refers to the reporter's transcript of that hearing. Copies of these transcripts will be supplied to the Court upon request.

[3]By his own admission, petitioner is not only attempting to secure relief from this Court from a matter still pending before the California state courts, and is thus not entitled to consideration by the Federal Courts as to that matter [*e.g., Lynch v. Field*, 415 F.2d 766 (9th Cir. 1969)], but he is not even properly before the California Court of Appeal as under state law there is no "appeal" from the denial of a petition for habeas corpus by a trial court. Cal. Pen. Code § 1506; *People v. Brotherton*, 236 Cal. App. 2d 195, 199, 48 Cal. Rptr. 513, 516 (1966). To obtain appellate habeas corpus relief petitioner must simply file an original writ proceeding in the state appellate court.

ARGUMENT

I

The Issue of Whether or Not the Prosecution Breached Its Portion of the Plea Bargain Has Been Factually Resolved Against Petitioner in Two Separate State Court Proceedings by Triers of Fact Using Proper Constitutional Standards, and There Is No Reason Why This Court Should Reach a Different Conclusion as to This Essentially Factual Issue

Relying on the recent decision of this Court in *Santobello v. New York*, 404 U.S. 257 (1971), petitioner in essence contends that he should be released from his plea bargain because the prosecution breached its promise to be neutral on the matter of probation with respect to communications to the Probation Department and recommendations to the sentencing Judge. (Pet. pp. 3-8.) Petitioner correctly notes that he presented evidence, prior to his first appeal in the California appellate courts, to the effect petitioner, in entering his plea of guilty, relied upon promises by the prosecution that the District Attorney's office would be neutral on the issue of probation and the investigation into petitioner's activities would not be continued; that the District Attorney's office did pursue the investigation and submit additional reports to the Probation Department; that the District Attorney's office stated that it would neither recommend nor oppose probation; and that at the time set for the matter of probation and sentence, the prosecution expressly requested that probation be denied and petitioner be sentenced to the California State Prison. (Pet. pp. 3-5.)

It is respondent's position the question of whether or not there was a breach of any promise upon which

petitioner relied in entering the plea bargain was essentially a question of fact, which was properly resolved against him in two separate California evidentiary hearings.

At the probation and sentence hearing, the court reviewed extensive evidence presented by both sides. The prosecution mainly presented evidence in the form of declarations, and the defense presented both testimonial and documentary evidence. Petitioner raised basically the same evidentiary assertions as are summarized in the petition. However, in response to petitioner's factual claims, the Los Angeles County Deputy District Attorney who handled the matter for the prosecution, George H. Rhodes, effectively countered by way of declaration that while he did state the "District Attorney's office would not interfere in the work of the Probation Department nor make any comments to the Probation Officer regarding any aspects of the case to sway the Probation Department or to help them make any decision in the particular matter at any time," Mr. Rhodes also indicated to defense counsel, Mr. Lambros, that "at the appropriate time in the Superior Court at the time of sentencing that [Mr. Rhodes] would make comments to the Court indicating that this was a 'state prison' type case and that [petitioner] stole somewhere between three and five million dollars in this particular matter. . . ." [Declaration of Deputy District Attorney George Rhodes, Cl. Tr. pp. 36-37.]

Mr. Rhodes' statement that he would indicate to the court that "this was a 'state prison' type case" clearly evidenced his intent to request that probation be denied and that petitioner be sentenced to the state prison. [Rep. Tr. p. 686.]

Respondent respectfully emphasizes that this evidentiary hearing was extensive. Petitioner called ten witnesses, and the matter was heard on nine separate court days. [Rep. Tr. *passim.*] Additionally, the Superior Court Judge had before him numerous items of documentary evidence filed by both parties. [Cl. Tr. *passim.*] The situation may be best summarized in the words of Justice Stephens of the California Court of Appeal:

> "In brief, the evidence presented on behalf of [petitioner] tended to support each of his first three contentions, and the evidence presented on behalf of the District Attorney tended to refute each of defendant's first three contentions. The Judge weighed the evidence and denied the motion." (Pet., App. A-4.)

The question thus becomes whether this Court should take it upon itself to reweigh the evidence, assess the relative credibility of witnesses, and resolve conflicting factual claims.

Respondent acknowledges that this Court has previously established that when a claim of constitutionally protected rights is involved it remains the duty of the Court to make an independent examination of the whole record. *Bachellar v. Maryland,* 397 U.S. 564, 566 (1970). However, while state court findings of fact are not binding on this Court, they are to be accorded great weight. *Michel v. Louisiana,* 350 U.S. 91, 96 (1955). Respondent respectfully requests that this Court accept the factual findings of the state courts in this case since there is nothing to indicate the merits of the factual dispute were not fully and fairly resolved in either of the evidentiary hearings conducted in the

instant matter. *Cf. Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Indeed, respondent would respectfully take the liberty of suggesting that Mr. Justice Douglas has already expressed a view in accord with respondent's position, stating in his order March 3, 1972 (Case No. A-833) denying petitioner's reapplication for bail that "the substantiality of the petitioner's application appears to depend upon an evidentiary inquiry, more appropriately taken by another tribunal . . . ." [C.T.H.C. p. 24; Pet. p. 6.][4]

Petitioner, however, alludes to *Santobello v. New York*, 404 U.S. 257 (1971), a decision of this Court filed after the decision of the California Court of Appeal in the instant case, which held that the defendant was entitled to relief from his plea bargain because the prosecution had broken its promise to make no recommendation as to sentence. *Santobello* does pe-

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[4]Respondent would in addition respectfully submit that its interpretation of Mr. Justice Douglas' sentiments is consistent with the following passage from a decision of this Court, which, though since overruled and questioned on other points, contains a yet viable statement on Federal Court jurisdiction of state criminal matters:

> "Primary, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.
>
> "A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. [Citations]" *Stein v. New York*, 346 U.S. 156, 181-182 (1953).

titioner no benefit for a number of reasons. To begin with, as reflected in part by the opinion of the California Court of Appeal (Pet., App. A-3), California has long recognized that a criminal defendant may be entitled to withdrawal of his guilty plea where the state has failed to perform its part of the plea bargain. *See, e.g., People v. Delles*, 69 Cal. 2d 906, 910-11, 447 P.2d 629, 632, 73 Cal. Rptr. 389, 392 (1968); *People v. Wadkins*, 63 Cal. 2d 110, 114, 403 P.2d 429, 432, 45 Cal. Rptr. 173, 176 (1965); *People v. Barteau*, 10 Cal. App. 3d 483, 486, 89 Cal. Rptr. 139, 141 (1970). Thus, governed by existing California law, the state appellate court and the sentencing judge were operating pursuant to proper constitutional standards which were unaffected by this Court's opinion in *Santobello*.

Additionally, a second evidentiary hearing, held pursuant to the appellate court Order to Show Cause (April 1972), occurred subsequently to *Santobello*[5], and constituted a further (and probably unnecessary) evidentiary evaluation of the factual matters at issue. The judge at this habeas corpus hearing had the benefit of fairly extensive testimony by petitioner and his witnesses on the one hand, and by the Deputy District Attorney who negotiated the plea bargain for the prosecution, the investigator who compiled and supplied the controversial report to the Probation Department, the judge who took the plea, and the Deputy District Attorney's supervisor, as well as voluminous documentary and written material. Again at this second hear-

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[5]Indeed, there were several express references to *Santobello*, both in writing and orally. [*E.g.*, C.T.H.C. pp. 14, 24, 29, 31-33; R.T.H.C. pp. 4, 256-57, 278, 281.]

ing, petitioner presented evidence which, if believed, would have entitled him to much, if not all, of the relief he sought.

However, in accordance with the very purpose of an evidentiary hearing, the prosecution presented evidence which both clarified possible factual doubts and effectively countered petitioner's factual allegations. In essence Mr. Rhodes testified that the plea bargain was reached between himself and Mr. Lambros, petitioner's attorney, before the prosecution had progressed to the stage of seeking a Grand Jury indictment. Though originally planning to charge petitioner with 20 to 25 counts arising out of his business dealings, Mr. Rhodes, after conversing with Mr. Lambros, decided to file a complaint alleging five counts only, to which petitioner was to plead guilty to one count. [R.T.H.C. pp. 24-27.] Mr. Rhodes stated that he would stay neutral and would not interfere with anything the Probation Department desired to do, and would not hold any conferences with the Department. However, Mr. Rhodes also said that he would indicate to the sentencing court that he felt this was a state prison type case because there had been between three and five million dollars misappropriated. [R.T.H.C. pp. 27, 43-45.] Mr. Rhodes did indicate to Mr. Lambros that the investigation would not continue since there was going to be a plea taken and the prosecution was not going to the Grand Jury. Mr. Rhodes believed that Mr. Lambros' disagreement arose from the fact that the investigator, Mr. Pailet, subsequently interviewed or reinterviewed some witnesses. Mr. Rhodes had told Mr. Pailet that the latter should account for the time he and Mr. Rhodes put in the case so that there would be some record in the District Attorney's file as to the entire picture of

what had happened with Guaranty Factors (petitioner's company). Mr. Rhodes in effect stated that the work which was subsequently done, including the witness interviews, was for purposes of refreshing the investigator's memory and for recapitulating and placing in a reportable form the great volume of complex information which the District Attorney's office already had.* [R.T.H.C. pp. 28-29, 45-46, 49-52, 71-72.] The investigator only acted to "recap" old material and did not go out and find new material [R.T.H.C. pp. 71-72]; there were no new items in the report. [R.T.-H.C. pp. 55-56.]

The investigator, Mr. Pailet, testified that his investigation of the case consisted of examining the voluminous books, records, and files of approximately fifteen companies. [Rep. Tr. pp. 108-09.] Mr. Rhodes informed him that there was going to be a plea and that he should write up the work he had done. It took Mr. Pailet approximately four or five weeks to prepare the report, which consisted of 102 pages. He could have written a report four times that large. [R.T. H.C. pp. 109-10, 129.] Mr. Pailet in essence went over the material he had and more or less put down available information on paper. While Mr. Pailet may have contacted certain persons in preparing his report, this

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*Mr. Rhodes explained the inconsistencies between his testimony at the habeas corpus hearing and statements in previous affidavits as the latter being the product of quick assent to statements prepared by other persons and his testimony at the hearing occurring after he had an opportunity to review his notes and the District Attorney's file. [Rep. Tr. pp. 73, 103-05.]

was for purposes of clarification or perhaps to obtain documents which he already knew were in existence but did not possess. Mr. Pailet did not continue the investigation into other matters in relation to the corporation or the transaction involved. [R.T.H.C. pp. 110-11.]

While he was preparing the report, Mr. Pailet was contacted by the Probation Officer, Mr. Coyner, two or three times. Mr. Pailet did not indicate any position on the question of probation. [R.T.H.C. pp. 112-14.] Mr. Pailet would normally write up a comprehensive report so that the office record would reflect the full scope of the allegations and the charges. [R.T.H.C. pp. 126, 191-52.] Mr. Pailet brought a copy of the finished report to Mr. Coyner's office because Mr. Coyner had asked him for it. [R.T.H.C. p. 150.] Mr. Coyner's desire to see Mr. Pailet's report did not affect Mr. Pailet's preparation of the report. [R.T.H.C. p. 162.]

Petitioner's counsel, Mr. Lambros, also took the stand at the hearing and testified as to the circumstances and details of the agreement with Mr. Rhodes. According to Mr. Lambros, they "discussed the termination of further investigation of this matter abruptly, and nothing would continue on, and whatever report was available at that point, whatever there was in the record at that point would go to the Court or to the Probation Department for delivery to the Court. That was all." [R.T.H.C. p. 180.] In other words, it was Mr. Lambros' understanding that only the infor-

mation previously compiled would be transmitted to the Probation Department. [R.T.H.C. p. 182.]

Respondent respectfully submits that the decision on the factual matters announced by the judge at this second evidentiary hearing is entitled to great weight and reflects the findings of a conscientious, knowledgeable, and very able fact finder. The judge, after hearing and assessing the credibility of conflicting witnesses, concluded that there was no breach of any commitment insofar as further investigation of petitioner's activities was concerned. [R.T.H.C. pp. 293-94, 300-01.] The judge, who had apparently dealt with the particular probation officer in the past, went on to observe that what upset the defense strategy was the case being assigned to an exceptionally dedicated and conscientious probation officer who was devoted to the task of presenting a total picture to the court and who wanted to make his own independent judgments on the matter. [R.T.H.C. pp. 299-300.] As to the matter of sentence recommendation, the judge found Mr. Rhodes had stated to Mr. Lambros that this case was a state prison type of case. [R.T.H.C. p. 301.]

As is the situation with the findings at the probation and sentence hearing, there is nothing in the record of the proceedings of the habeas corpus hearing to indicate any reason why the factual determinations of the California courts in the instant matter should not be accepted by this Court. *See Townsend v. Sain, supra,* 372 U.S. 293, 313 (1963); *Michel v. Louisiana, supra,* 350 U.S. 91, 96 (1955).

II

Petitioner's Contention That He Entered His Plea Based Upon Mistake, Ignorance, or Inadvertence Has Been Factually Resolved Against Him in the State Courts, and There Is No Reason Not to Accept the State Evidentiary Determination

Petitioner raises as an additional ground for his release from his plea bargain the assertion that his plea "was based on mistake, ignorance, or inadvertence as to probation, the facts, the factual basis and essential elements of the charge, the defenses thereto and proof requirements." (Pet. pp. 8-9.)

Respondent takes a position similar to that in Argument I above, namely that petitioner has been given at least one factual hearing on this contention in the state courts and that there is no reason for this Court not to accept the resolution of the issue against petitioner. As summarized by the opinion of the California Court of Appeal, petitioner in effect presented evidence in support of his contention and the prosecution countered his contention with its own evidence, and the factual determination was against petitioner. (Pet., App. A-4.)

The state court record of the probation and sentence hearing is supportive of respondent's position herein. Prior to petitioner's plea, Mr. Rhodes had explained the entire case to petitioner's defense counsel, Mr. Lambros. [Cl. Tr. p. 35.] Additionally, Mr. Lambros had represented appellant at all of the meetings of the Creditors' Committee apparently established in ref-

erence to difficulties suffered by petitioner's business which became known, since August of 1966. [Cl. Tr. p. 33.] It was entirely reasonable for the state courts to infer, and is now reasonable for this Court to infer, that Mr. Lambros apprised petitioner of what he had learned at the meetings with Mr. Rhodes and the Creditors' Committee. Appellant's basic awareness of the essential nature of the charges against him may be seen by the fact that on September 5, 1968, after having been admonished of his constitutional rights, petitioner had a conversation with an investigator from the Los Angeles County District Attorney's office in which he stated he knew his company was in serious trouble in late 1965 and early 1966, that they were looking for money and investors, and that they thereafter accepted investments but without telling the investors that the company was insolvent. [Cl. Tr. pp. 38-41.] Count I of the complaint, the count to which petitioner pleaded guilty, charged that appellant had obtained money from a named investor and that petitioner deliberately failed to inform the investors that Guaranty Factors was insolvent. [Cl. Tr. p. 7.] These facts, taken together, constitute virtually a concrete case to the effect that petitioner was aware of the factual basis and essential elements of the charge to which he pleaded guilty.

When petitioner entered his plea, he stated that he understood the nature of the charge, that he had discussed the charge and the facts of the case with de-

fense counsel, and that he was pleading guilty because he was in fact guilty of Count I.[7] Indeed, at the habeas corpus hearing, the judge who presided over the taking of the plea testified that she believed petitioner when he stated that he entered the plea freely and voluntarily and because he was guilty.[8] [R.T.H.C. p. 80.] Petitioner's in-court and out-of-court statements, taken together, establish that he knew the factual and legal basis as well as the elements of the grand theft charge, the defenses to that charge, and the proof requirements.

Indeed, as the record indicates, the judge who presided at the probation and sentence hearing spent a great deal of time reviewing the matter, and the judge fairly and conscientiously resolved petitioner's factual contention of mistake and ignorance against him. [Rep. Tr. pp. 657-58, 660.]

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[7]This may be verified by reference to pages 4 and 5 of Exhibit A attached to Petitioner's Application to Augment the Record filed in his state appeal from the conviction.

[8]Petitioner, it may be noted, was not without experience with the criminal law process. It appears that he had been involved in a matter in Seattle in 1948 when $10,000 was allegedly obtained by false pretenses, but, by petitioner's own statement, he was able to obtain the friendship of an assistant district attorney and plead guilty in exchange for probation and restitution. [R.T.H.C. p. 298.]

III

Petitioner's Plea Was Not the Result of Ineffective or Unprepared Counsel

Petitioner contends that he should be entitled to relief from his plea bargain because of the inability or failure of his counsel to investigate the facts underlying the charge and the defenses thereto, and his failure to confer with his client with regard to the facts, defenses, and proof requirements of the charged offense. (Pet. pp. 10-11.)

With respect to the portion of petitioner's contention alleging he was not conferred with regarding facts and defenses relating to the crime charged, respondent respectfully submits that this contention has in large part been answered by the showing of petitioner's awareness of the matters involved in Argument II above. To the extent that this has not been shown, respondent again would rely on the state court factual determination that counsel was not inadequate. (*See* Pet., App. A-4.)

Respondent would first note that the test regarding ineffective counsel used in California is essentially the same as that used by the federal courts. Compare *In re Saunders*, 2 Cal. 3d 1033, 1041-42, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970), and *People v. Ibarra*, 60 Cal. 2d 460, 464-65, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963) with *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), and *Bruner v. United States*, 432 F.2d 931, 933 (10th Cir. 1970). Two trial level state courts and one state appellate court have all, using the California standard, rejected appellant's contention of ineffective counsel.

As indicated above, Mr. Lambros was present at all the creditors' meetings relating to Guaranty Factors, and received an explanation of the case prior to petitioner's guilty plea. [Cl. Tr. p. 35.] The facts that petitioner, as shown above, understood the nature of the charge, that he had discussed the charge and the facts of the case with Mr. Lambros prior to pleading guilty, and that Mr. Lambros indicated to Mr. Rhodes that petitioner desired to plead guilty to one count of grand theft [Cl. Tr. p. 35], tend to show adequate preparation and discussion of the case by Mr. Lambros. Counsel for petitioner, at the probation and sentence hearing, advanced the claim of his own ineffectiveness, asserting a lack of opportunity to review the voluminous files involved, stating that he had "shunned" his responsibility to petitioner under the circumstances, and expressing his feeling that "maybe I shouldn't have allowed it [the guilty plea]." [Rep. Tr. 647, 656.] However, no doubt noting that the law does not demand retrospective perfection of defense counsel, merely that his advice be within the range of competence expected of criminal trial attorneys [*McMann v. Richardson*, 397 U.S. 759, 771 (1970)], the Superior Court Judge denied the petition.

While perhaps not dealing with precisely the same issue, the judge at the habeas corpus hearing came to a similar conclusion. Among the important observations by the judge were the following: Mr. Lambros was undoubtedly aware that petitioner's damaging admission to the District Attorney's investigator was virtually a confession to theft by false pretenses. [R.T. H.C. pp. 296-97]; Mr. Lambros was familiar with the business activities of petitioner because he had been representing him for some time in petitioner's efforts

to secure additional financing [R.T.H.C. p. 286]; Mr. Lambros thought he could present a situation to the judge where petitioner was on the streets and his creditors wanted him to remain there in order to retrieve their money [R.T.H.C. p. 298]; since petitioner was articulate, had a fine family, and was a good salesman, it was no doubt hoped petitioner could charm the probation officer into a favorable report [R.T.H.C. pp. 298-99]; under the circumstances, entering the plea bargain was the sensible thing to do and petitioner's plans went awry only because an exceptionally independent, dedicated, and conscientious probation officer was appointed to his case. [R.T.H.C. pp. 299-399.] The court further observed that it had apparently been petitioner's strategy to establish that Mr. Lambros "was sort of an inept, congenial bumbler . . . and misled [petitioner] into pleading guilty without an awareness of what he was doing or what was happening or what was involved." The judge expressly rejected this implication. [R.T.H.C. pp. 294-95.]

The evidentiary bearing judges in this case, especially the habeas corpus judge, had the unique opportunity to personally observe the witnesses, including Mr. Lambros. It was perhaps due to factors such as this that this Court has observed that the question of competence of trial counsel is largely one for trial courts. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Before closing, respondent must respectfully note it is most peculiar indeed that a criminal defendant would allege in his state court appeal (as is also the situation in the instant petition) that his counsel was incompetent or ineffective, but nevertheless continue to retain that same attorney as co-counsel during attempts for post-conviction relief.

IV

Boykin v. Alabama Should Not Be Retroactively Applied

In what clearly is petitioner's contention of most potential legal significance, his last claim is to the effect the principles of *Boykin v. Alabama*, 395 U.S. 238 (1969), should be retroactively applied to his case, and that so applied those principles render his plea in the instant case involuntary and unknowing.[9] (Pet. pp. 12-13.)

Respondent concedes that the specific inquiries required by *Boykin* were not made in the instant case, inasmuch as the guilty plea herein preceded the *Boykin* decision. Respondent respectfully submits, however, that the guilty plea herein was a voluntary act and hence passes constitutional muster. *See, e.g., Machibroda v. United States*, 368 U.S. 487, 493 (1962); *United States ex rel. Sanders v. Maroney*, 438 F.2d 1185, 1186 (3rd Cir. 1971). That the plea was voluntary was the conclusion of both of the judges who presided at the state evidentiary hearings in the instant case and of the California Court of Appeal, whose opinion contains an excerpt from the Reporter's Transcript of the guilty plea. (*See* Pet., App. A-5.)[10] In-

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[9]Petitioner uses language to the effect that even if *Boykin* is deemed not to be retroactive, the principles announced in that case should nevertheless be controlling in the instant case. This seems to be nothing more than a statement that even if *Boykin* is not retroactive, it really should be, or, in other words, petitioner is indirectly contending that *Boykin v. Alabama* should be retroactively applied.

[10]The Judge who took petitioner's plea testified at the habeas corpus hearing that she believed the plea was entered freely and voluntarily. [R.T.H.C. p. 80.]

deed, petitioner articulates no recognizable contention that his plea might be considered other than knowing and understanding under pre-*Boykin* standards.

The question then remaining is whether or not the *Boykin* decision should be given retroactive effect. Respondent respectfully submits that it should not. This Court, based on Rule 11 of the Federal Rules of Criminal Procedure, announced requirements in the taking of pleas in Federal Courts similar to the requirements of *Boykin*. *McCarthy v. United States*, 394 U.S. 459 (1969). In *Halliday v. United States*, 394 U.S. 831, 832-33 (1969), the Court determined that the requirements of *McCarthy* and Rule 11 should not be applied retroactively. Based upon the readily apparent analogy between the *McCarthy* situation and the *Boykin* situation, a number of courts have similarly determined that the requirements of *Boykin* should not be retroactively applied. *E.g.*, *United States ex rel. Sanders v. Maroney*, 438 F.2d 1185, 1186 (3rd Cir. 1971); *Benn v. Eyman*, 436 F.2d 1074, 1075 (9th Cir. 1971); *United States ex rel. Rogers v. Adams*, 435 F.2d 1372, 1374-75 (2d Cir. 1970), *cert. denied*, 404 U.S. 834 (1971); *In re Tahl*, 1 Cal. 3d 122, 135, 460 P.2d 449, 498, 81 Cal. Rptr. 577, 586 (1969), *cert. denied*, 398 U.S. 911 (1970); *cf. Johnson v. New Jersey*, 384 U.S. 719, 721, 734 (1966).

Respondent respectfully submits that there is no reason why state court guilty pleas should be treated differently than Federal Court guilty pleas and that, accordingly, *Boykin* should not be retroactively applied.

Conclusion

For the reasons expressed above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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